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FEDERAL COMMUNICATIONS COMMISSION
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In the Matter of)

Implementation of Section 3 of the)
Cable Television Consumer Protection)
and Competition Act of 1992)

Tier Buy-Through Prohibitions)

MM Docket No. 92-262

REPLY COMMENTS OF
THE NATIONAL CABLE TELEVISION ASSOCIATION, INC.

The National Cable Television Association, Inc. ("NCTA"), by its attorneys, hereby submits its reply comments on the Notice of Proposed Rulemaking on the implementation of the tier "buy-through" provision in section 3 of the Cable Television and Consumer Protection Act of 1992.

INTRODUCTION AND SUMMARY

As the initial comments in this proceeding overwhelmingly demonstrate, most cable systems lack the technical sophistication to immediately implement the buy-through prohibition in the 1992 Cable Act. The prohibition, which precludes cable operators from requiring subscribers to purchase any tier of service as a condition of access to video programming offered on a per-channel or per-program basis, requires the ability to isolate every channel. Only those systems that are fully addressable -- i.e., may authorize or deauthorize all channels electronically from the headend -- have that capability and should be required to comply

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with the buy-through provision today.^{1/} Any other approach would be costly and ineffective.

In recognition of the current state of cable technology, Congress enacted a scheme aimed at phasing out the common practice of requiring the purchase of certain premium and pay-per-view channels to the purchase of intermediate tiers of service. The ten-year transition period would give the cable industry adequate time to deploy the necessary technology and equipment, such that, by the year 2002, cable subscribers would be able to pick and choose among the whole panoply of tiers and services offered by systems. And they would be assured access to such tiers and services without being forced to buy other tiers and services.

Congress also recognized that imposing the buy-through provision too early could put upward pressure on rates. Therefore, it adopted a waiver process to ensure that the provision, which is part of the larger rate regulation provision, would not defeat the overriding goal of maintaining reasonable rates.

Despite Congress' concern about premature implementation of the buy-through ban, the National Association of Telecommunications Officers and Advisors, the National League of Cities, the United States Conference of Mayors and the National

1/ Fully addressable systems scramble all tier channels and provide addressable converter boxes to every subscriber.

Association of Counties, collectively the "Local Governments", seek to apply the provision automatically to all cable systems. In so doing, the Local Governments have misread the statute and have dismissed the technical and operational ramifications, and most importantly, the costs of such a course. We now address their arguments.

DISCUSSION

I. CABLE SYSTEMS DO NOT HAVE THE TECHNICAL CAPABILITY TO COMPLY WITH THE BUY-THROUGH PROVISION WITHOUT INCURRING SIGNIFICANT COST AND CONSUMER DISSATISFACTION.

A. Existing Technology

Although the buy-through provision is aimed at increasing subscriber choice, Congress expressly recognized that lack of addressability and other technological limitations may impede cable operators from complying with the provision at this time. The Local Governments maintain, however, that the technology is already in place for most cable systems to comply with the buy-through mandate at reasonable cost today.

This is simply wrong. As cable parties repeatedly explained, isolating every per-channel and per-program service with today's non-addressable technology presents a whole host of technical and operational problems, including endangering system reliability and signal quality.^{2/} Indeed, a buy-through

2/ See e.g., Comments of Newhouse Broadcasting Corporation, Time Warner Entertainment Company, L.P., Viacom, Cole, Raywid & Braverman, Cox, Community Antenna Television Association, Consortium of Small Systems.

scenario based on a complex configuration of traps is inefficient, costly, and, in most systems, untenable.^{3/}

Nevertheless, the Local Governments argue that unbundling cable services can be accomplished by simply utilizing negative traps. They suggest, for example, that the cable operator use a trap to block out the mid-band channel frequencies, where intermediate or expanded tier services could be located, and access the upper channel offerings. But the installation of a mid-band trap to filter out the expanded basic tier for basic-only subscribers would also filter out all premium and pay-per-view channels located in the expanded basic tier. In order to offer the basic-only subscriber all pay services without taking an intermediate tier, the operator would have to rearrange the entire system and provide a whole new series of traps to accommodate individual channel selection. Moreover, realigning all per-channel and per-program services in the upper band restricts the ability to add new pay services and multiplexed services in the future. Furthermore, in many systems, operators

3/ Tele-Communications, Inc. has made the business decision to implement the buy-through provision by April 1, 1993 by using non-addressable technology. TCI's plan involves an elaborate system-by-system reconfiguration that, in some instances, will result in the loss of one or more pay services. It also rests on certain underlying assumptions: the freedom to place certain must carry stations on off-channel positions; the preemption of local franchise requirements to carry a basic tier in excess of the federally-mandated tier; and the exemption of small systems. Although system redesign and other measures may be feasible for TCI, such action has its trade-offs and is not an industry-wide solution.

tend to use traps in the low band for high penetration pay services due to concerns about the consumer unfriendliness of scrambling.

Full addressability is the only practical solution to segregating individual channels. But, as cable parties have pointed out, the installation of scrambling equipment at the headend for every channel and addressable converters in every home is extremely costly.^{4/} Although the Local Governments seem to dismiss the cost implications of buy-through, even they concede that the Commission should carefully consider the financial impact on the operator's overall costs and profitability in applying the exemption and waiver provisions.

Cable commenters agree that if an operator is capable of complying with the buy-through provision with minimal cost (or if it upgrades to compliance level during the transition period), it should be required to comply. But to assume that every cable system is currently able to comply with de minimis cost reflects a fundamental lack of understanding of the technology of most cable systems.

Indeed, Congress recognized the need to achieve addressability in its buy-through scheme, and the Commission correctly noted that cable systems which were not designed and built with (or upgraded to incorporate) addressable technology

4/ See e.g., Comments of NCTA, Cole Raywid & Braverman, Viacom, Time Warner Entertainment.

are by definition within the scope of the Act's 10-year exemption. While the Local Governments may wish to stretch the capabilities of existing cable technology, the Commission should not ignore the technological realities.

B. Small Systems

In our comments, NCTA explained that compliance with the buy-through requirement would be excessively burdensome for small systems, thereby justifying an exemption.^{5/} The Local Governments call for a narrow exemption that only covers systems not owned by multiple system operators ("MSO"). Adoption of their proposal would be inconsistent with congressional intent, prior Commission practice and sound policy.

The statute directs the Commission to design rate regulations that "... reduce the administrative burdens and cost of compliance for cable systems that have 1,000 or fewer subscribers." 47 U.S.C. Sec. 623(i). Senator Inouye, the bill's floor manager, endorsed the small system exemption, and drew no distinction between MSO-affiliated and other cable systems.^{6/} In its NPRM implementing the rate regulatory provisions, the Commission seeks "comment on whether to exempt small systems from any substantive or procedural rate regulation

5/ See NCTA Comments at 12-14.

6/ 138 Cong. Rec. S14608-9 (daily ed. Sept. 22, 1992) (statement of Sen. Inouye).

requirements...."^{7/} The Commission notes that existing rules exempt all small systems from network non-duplication, syndicated exclusivity, sports blackout and certain technical standards requirements.^{8/} Every one of these small system exemptions were adopted without regard to a system's affiliation.

All small systems, not just those unaffiliated with a multiple system operator, experience the economic conditions that warrant application of the small system exemption. The fixed costs associated with compliance, including new headend and channel equipment, cannot be spread over the limited small system subscriber base without forcing precisely the sort of rate increases that Congress directed the Commission to avoid. See 47 U.S.C. Sec. 623(b)(8)(C). The suggestion by Local Governments that MSO-affiliated small systems should bear these costs, either by increasing rates to small system subscribers or engaging in cross-subsidy by increasing rates to subscribers of other systems, is antithetical to the Act.

C. Partially Addressable and Newly-Constructed Systems

The Local Governments also seek a rule requiring a system undergoing modification to bring itself into compliance. The Act does not require, however, any cable system to upgrade its

7/ Implementation of the Sections of the Cable Television Consumer Protection and Competition Act of 1992, FCC 92-544, released Dec. 24, 1992, at para. 130.

8/ Id.

facilities to comply with the buy-through requirement anytime before the ten-year implementation period ends. Moreover, as a policy matter, while cable systems are expected to make the financial commitment to addressability during the ten-year period, the Commission should not force compliance prematurely.

In addition, the Local Governments urge the Commission to require systems that are providing addressability in some areas to provide addressability throughout the entire franchise area. However, requiring partially addressable system to comply with the buy-through provision would be inconsistent with the statutory language. Under the Act, systems that are unable to provide all basic subscribers with all per-channel and per-program offerings are unable to comply. Thus, partially addressable systems are by definition exempt. The Commission should not force such systems to come into compliance until they are ready and able to commit the financial resources to full addressability.

D. Administrative Authority

Along with an automatic presumption that cable systems have the capability to implement the buy-through provision, the Local Governments seek the authority to be the initial arbiter of whether a system is capable of compliance. Under their proposal, the cable operator would be required to submit a written petition to the local franchising authority detailing the technical impediments to offering per-channel and per-program services to basic-only subscribers. The Commission would only hear appeals

implicating national considerations or requiring special Commission expertise.

First, in section 3 of the Act, Congress did not grant local franchisors the authority to administer the buy-through provision. And the Commission, absent an explicit legislative directive, lacks the requisite authority to delegate implementation and oversight of the buy-through prohibition to local governments. If Congress had intended for local franchising authorities to exercise their discretion in applying the ten-year exemption period or the waiver process, it could have done so.

Second, a definitive Commission rule on what constitutes technical capability will ensure that the buy-through provision is applied consistently to all cable systems. Once the Commission adopts the appropriate test, the exemption will be self-executing. Those systems that are unable to comply without incurring costs that would raise rates would still have the opportunity to make a showing under the waiver procedure.

II. THE BUY-THROUGH PROVISION'S PURPOSE WILL BE SERVED SO LONG AS SUBSCRIBERS TO THE BASIC SERVICE TIER ARE NOT REQUIRED TO PURCHASE OTHER TIERS AS A CONDITION TO THE PURCHASE OF PER-CHANNEL OR PER-PROGRAM SERVICES

The buy-through provision was narrowly tailored to deal with a specific practice. The provision's goal -- its only goal -- is to permit basic service subscribers to purchase per-channel and per-program services without being forced to purchase of intermediate tiers. The statute imposes no other related

obligations on cable operators. Regulations that would impose additional obligations are ultra vires.

No other interpretation of the statute is possible. Under the statute, "[a] cable operator may not require the subscription to any tier other than the basic service tier ... as a condition of access to video programming offered on a per-channel or per-program basis."^{9/} To prevent cable operators from accomplishing the prohibited act through discriminatory pricing, the Act further provides that "[a] cable operator may not discriminate between subscribers to the basic service tier and other subscribers with regard to the rate charged for video programming offered on a per-channel or per-program basis."^{10/}

The Commission interprets this provision to mean that (1) all subscribers will purchase the basic service tier, (2) subscribers purchasing the basic tier are entitled to buy through to per-channel or per-program services without purchasing intermediate services or tiers, and (3) basic tier subscribers who do buy through are entitled to the same rate structure for per-channel or per-program services as subscribers purchasing intermediate services or tiers. But as NCTA explained in our comments, except for the second point these interpretations go too far, in that they try to accomplish more than the statute's narrow purpose of ensuring basic subscribers

9/ 47 U.S.C. Sec. 543(b)(8)(A).

10/ Id.

the ability to buy per-channel or per-program services without also purchasing intermediate services.^{11/}

In their joint comments, the Local Governments misread the statute as entitling basic tier subscribers who purchase per-channel or per-program services "... to pay the same prices for those ... services as subscribers purchasing intermediate services or tiers."^{12/} They further maintain that any discounts offered must be uniform to all subscribers.^{13/} The Staff of the New Jersey Office of Cable Television ("NJOCT") argues that the buy-through prohibition applies "if single channel premium services are offered on a tier or cluster under one price...."^{14/} The Massachusetts Community Antenna Television Commission ("MCATC") interprets the practice of package discounting as unlawfully discriminatory.^{15/}

Local Governments, NJOCT and MCATC misread the language of the statute. Local Governments are wrong that basic subscribers are invariably entitled to obtain all services at the same prices as all other subscribers. Nothing in the statute prevents a cable operator from offering discounted packages of programming

11/ Comments of NCTA at 18-19.

12/ Comments of Local Governments at 11.

13/ Id. at 13.

14/ Comments of the Staff of the New Jersey Office of Cable Television at 5.

15/ Comments of the Massachusetts Community Antenna television Commission at 4-5.

selectively to subscribers that purchase intermediate tiers, or from bundling per-channel or per-program services with other non-basic programming services and offering these services to subscribers at a discount. NJOCT is wrong that cable operators may not bundle single channel services and offer them to selected groups of subscribers at a discount. MCATC is wrong that package discounting is necessarily unlawfully discriminatory.

In fact, as other commenters note, packaging of programming and the offering of discounts for program packages is highly beneficial.^{16/} Packaging of programming "[R]educes prices to individual subscribers by achieving economies of scale, generating more subscribers, serving as an efficient marketing mechanism, increasing advertising revenues, and spreading fixed costs over a greater base."^{17/} Packaging increases the "reach" of basic cable networks, enabling these networks "to generate the revenues they need -- from both subscriber fees and advertising - - to improve programming and to launch new program services."^{18/} Moreover, pay packaging, like basic packaging, is permissible and in the public interest.^{19/}

Thus, the statute should not be interpreted to prohibit selective packaging and discounting to intermediate tier

16/ See e.g., Comments of Adelphia, et al., Viacom, Time Warner.

17/ Comments of Discovery Communications, Inc. at 7.

18/ Comments of USA Networks and ESPN, Inc. at 5.

19/ See e.g., Comments of Encore Media Corp. at 6-8.

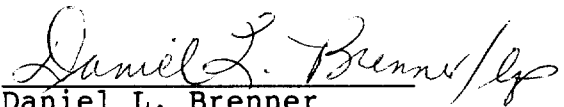
subscribers. It should not be used to require the cable operator to condition access to per-channel or per-program services upon the subscriber's purchase of the basic tier. And, it should not be understood to inevitably bar cable operators from charging different per-channel or per-program rates to basic only and other subscribers, especially if the different service prices are related to different costs of providing service. If a cable operator offering the basic tier also offers these subscribers access to per-channel or per-program services, without requiring purchase of an intermediate tier, and in the process does not charge rates for program services that effectively circumvent the prohibition, the statute is satisfied. Nothing more is required.

CONCLUSION

For the foregoing reasons, the Commission should apply the ten-year buy-through exemption to all cable systems that are not fully addressable, and should not limit cable operators' marketing and packaging flexibility.

Respectfully submitted,

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